(2)

No. 99-7000

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

BOBBY LEE RAMDASS,
Petitioner-Appellant,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Bobby Lee Ramdass, by counsel, respectfully requests leave to file the accompanying petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

48 pp

Petitioner has previously been granted leave to proceed *in forma pauperis* in the United States Court of Appeals for the Fourth Circuit, the United States District Court for the Eastern District of Virginia, and the Supreme Court of Virginia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 11/12/99, I caused the foregoing Motion for Leave To Proceed *In Forma Pauperis* to be served by hand delivery on Katherine P. Baldwin, Esq., Assistant Attorney General, 900 East Main Street, Richmond, VA 23219.

F. Nash Bilisoly

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Imminent Execution Scheduled
November 23, 1999

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99-7000
Ramdass
v
Angelone

Capital Case

QUESTIONS PRESENTED

1. *Simmons v. South Carolina* holds that when a prosecutor seeks the death sentence on the ground of the defendant's future dangerousness, the defendant has a constitutional right to inform the jurors truthfully that if they spare his life, state law forbids him ever to be released from prison. Does the rule in *Simmons* turn on the actual operation of state law, or on its hypertechnical terms; and must a federal habeas court adjudicating a *Simmons* claim make its own analysis of the functional consequences of state law, or is it bound by the state courts' characterization of state law for federal constitutional purposes?

2. *Ake v. Oklahoma* holds that an indigent capital defendant has a right to court assistance in obtaining the services of a mental health expert as a defense consultant and possible expert witness when the prosecutor puts the defendant's mental condition in issue in the course of seeking a death sentence on the ground of the defendant's future dangerousness. Is the *Ake* rule limited to cases in which the prosecutor presents expert testimony going to future dangerousness, or does it apply whenever the defendant's mental condition is to be a significant factor at sentencing?

3. In addition to rejecting petitioner's *Simmons* and *Ake* claims on the merits in an opinion presenting the two Questions set out above, the Court of Appeals held alternatively that 28 U.S.C. § 2254(d)(1) required it to accept the state-court resolution of those claims (and that *Teague* required it to accept the state-court rejection of petitioner's *Simmons* claim) without independent federal adjudication. These alternative grounds invoked the same Fourth Circuit construction of § 2254(d)(1) that this Court is reviewing on *certiorari* in *Williams (Terry) v. Taylor*. Is that construction erroneous?

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v.

RONALD ANGELONE, DIRECTOR,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled
November 23, 1999

Bobby Lee Ramdass, a Virginia inmate under sentence of death, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit reversing the district court's grant of Ramdass' petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999), and is reprinted in the accompanying Appendix ("App.") at 1-20. The opinion of the

district court is reported as *Ramdass v. Angelone*, 28 F. Supp.2d 343 (E.D. Va. 1998), and is reprinted at App. 21-52. The initial opinion of the Virginia Supreme Court on direct review is reported as *Ramdass v. Commonwealth*, 437 S.E.2d 566 (Va. 1994), and is reprinted at App. 56-64. This Court's order granting certiorari, vacating that judgment, and remanding for reconsideration in light of *Simmons* is reported as *Ramdass v. Virginia*, 512 U.S. 1217 (1994), and is reprinted at App. 55. The opinion of the Virginia Supreme Court on remand is reported as *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994), and is reprinted at App. 53-54.

JURISDICTION

The court of appeals issued its judgment and decision on August 3, 1999. Ramdass filed a timely petition for rehearing and suggestion for rehearing *en banc* on August 17, 1999. The court of appeals denied the petition for rehearing on September 17, 1999. App. 65-66. Ramdass invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows:

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.
>
> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

For unknown reasons, Bobby Lee Ramdass went on a sudden crime spree in the summer of

1992. As relevant to this petition, his offenses included robbery at a Pizza Hut in Fairfax County, Virginia, on August 25, 1992; robbery at a Domino's Pizza in Alexandria, Virginia, on August 30, 1992; and robbery at a 7-Eleven in Fairfax County on September 2, 1992. During the 7-Eleven robbery, Ramdass shot and killed Mohammed Kayani, a store employee.

Ramdass was quickly apprehended, and the various charges against him came on for trial in rapid succession. A jury found Ramdass guilty of the Pizza Hut robbery on December 15, 1992, and the trial court entered judgment on January 22, 1993. Another jury found him guilty of the Domino's Pizza robbery on January 7, 1993, and the trial court entered judgment on February 18, 1993. A third jury found him guilty of capital murder for the death of Mohammed Kayani on January 28, 1993, and it fixed his sentence at death on January 30, 1993. The sole aggravating factor establishing Ramdass' eligibility for death in the capital case was the jury's finding that he likely "would commit criminal acts of violence [in the future] that would constitute a continuing serious threat to society." Virginia Code § 19.2-264.4(C).

This petition concerns two ways in which Ramdass was prevented from rebutting the evidence of future dangerousness and presenting the jury with reasons to impose a sentence less than death.

I THE VIOLATION OF *SIMMONS v. SOUTH CAROLINA*

A. Trial and Direct Appeal

During sentencing deliberations in the capital case, the jury sent out the following question: "If the Defendant is given life, is there a possibility of parole at some time before his natural death?" (JA 154).[1] Over counsel's objection, the court advised the jurors not to concern themselves with

[1] The term "JA" refers to the joint appendix in the proceedings before the Fourth Circuit. Respondent reportedly has lodged a copy of that appendix with the Court.

what may happen after sentencing. (JA 157). Although Ramdass maintained that he was not eligible for parole, the Virginia Supreme Court upheld the constitutionality of this ruling on direct appeal, and it affirmed the death sentence. App. 63. Ramdass challenged the ruling again in a petition for writ of certiorari. This Court granted certiorari, vacated judgment, and remanded for reconsideration in light of *Simmons v. South Carolina*, 512 U.S. 154 (1994). App. 55.

On remand, Ramdass asserted that his rights under the due process clause of the Fourteenth Amendment were violated by the trial court's refusal to provide the jurors with truthful information about the impossibility of release on parole. Ramdass posited that he was not eligible for parole under Virginia's "three strikes" law, which provides in relevant part that:

> [a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

Virginia Code § 53.1-151(B1).[2] Ramdass identified his three qualifying convictions as the Pizza Hut offense, the Domino's Pizza offense, and the capital murder.

The Virginia Supreme Court agreed that the Pizza Hut robbery counted as the first "strike" under the statute, and the capital murder counted as the second "strike." App. 54. The court refused to count the Domino's Pizza robbery as the third "strike," however, on the ground that Virginia's parole statute specifically requires three "convictions," and a jury verdict of guilt does not become a conviction until it is reduced to judgment. App. 43. The court held that because the Domino's Pizza verdict was not reduced to judgment until about two weeks *after* the capital murder sentencing trial, Ramdass was technically still eligible for parole on the day that the jury considered his sentence

[2] Virginia Code § 53.1-151 is reprinted in full at App. 68-70.

for capital murder. App. 54. The state court treated this analysis of the meaning of the word "conviction" as dispositive of Ramdass' constitutional rights under *Simmons*, and it again affirmed the death sentence. App. 54. This Court denied certiorari review. *Ramdass v. Virginia*, 514 U.S. 1085 (1995).

B. Federal Collateral Proceedings

After exhausting state remedies, Ramdass filed a federal petition for writ of habeas corpus.[3] As his first issue, Ramdass alleged that the trial court violated his rights under the Eighth and Fourteenth Amendments when it refused to provide the jurors with truthful information that if they sentenced the defendant to life imprisonment, there was no possibility of release on parole. Ramdass pointed to specific language in *Simmons* stating that the rule in that case applies when state law prohibits the possibility of release on parole, and he contended that the rule is not limited to cases where the defendant is technically ineligible for parole. The difference between these two formulations is subtle but important. In Ramdass' view, *Simmons* directs courts to employ a pragmatic, functional test of the possibility of release on parole; it does not demand the use of a technical, legalistic test.

The magistrate judge recommended that the writ be granted on the *Simmons* issue because the state court's hypertechnical decision was "contrary to clearly established Federal law, as

[3] Ramdass alleged in his state habeas petition that his rights under both the Eighth and Fourteenth Amendment rights were violated when the trial court refused to inform the jury that if they sentenced Ramdass to life imprisonment, he would not be considered for release on parole during his lifetime. (JA 251-54). The state habeas court dismissed this claim under its rule against repetitive review, citing *Hawks v. Cox*, 175 S.E.2d 271 (1970). (JA 283). The rule in *Hawks* does not bar consideration of a claim in federal court. *See, e.g., Correll v. Thompson*, 63 F.3d 1279, 1289 n.8 (4th Cir. 1995) (*Hawks* is a rule in the nature of collateral estoppel; "a dismissal under *Hawks* does not bar federal habeas review"), *cert. denied*, 516 U.S. 1035 (1996).

determined by the Supreme Court of the United States." (JA 805). He noted "that the question asked by the jury was not couched in terms of actual parole eligibility, but instead, whether there was 'a possibility of parole at some time before his natural death.'" (JA 810). He concluded, "[t]his Court does not believe that *Simmons* was limited to the very narrow issue of specific parole eligibility or lack thereof. . . . The Virginia Supreme Court's response, on remand, imposes limits on the application of *Simmons* not fairly contemplated by the language in the opinion." (JA 811-12).

Following *de novo* review, the district court granted the writ because the state court's decision "involved an 'unreasonable application' of *Simmons* as determined by the Supreme Court of the United States." (JA 850). "[B]y concluding that Petitioner was parole eligible based on the lack of the ministerial act of a trial court entering judgment, the Virginia Supreme Court evaded the full import of *Simmons*." (JA 858). Further:

> assuming the definition of "conviction" was properly determined by the Virginia Supreme Court, the trial court, prosecution, and defense must have clearly understood that Petitioner was subject to life without parole. That is, everyone was aware that, at the time of the capital sentencing phase, Petitioner had either plead guilty or been found guilty by a jury of at least three qualifying felony offenses under Virginia Code Section 53.1-151(B). Indeed, these offenses were relied upon to establish Petitioner's future dangerousness. The jury could have been informed, with all confidence, that Petitioner would never be released from prison, thereby rebutting the notion that he presented a future danger to society. Nevertheless, by the Virginia Supreme Court concluding that Petitioner was parole eligible and that therefore the trial court's answer to the jury's question was acceptable, the Commonwealth of Virginia "succeed[ed] in securing a death sentence on the ground of future dangerousness while at the same time concealing from the jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment [for Petitioner] means without parole." *Simmons*, 512 U.S. at [162].

(JA 858).

A divided panel of the Fourth Circuit reversed. The majority held that *Simmons* applies only in the narrow circumstances where a defendant is technically and legally ineligible for parole on the

date of the capital sentencing proceeding. The majority essentially advanced three reasons. First, it announced that *Simmons* turns solely on the state court's determination of its own law, and that this determination is dispositive:

> [T]he fact that a defendant will have no possibility of parole if given a life sentence can only stem from the legal conclusion that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law.

App. 11 (emphasis omitted).

Second, the majority said that conditioning the application of *Simmons* on a functional determination that the defendant will never be eligible for release on parole "is simply incompatible with the logic of *Simmons* itself." App. 10. According to the majority, this logic is reflected by statements in Justice O'Connor's concurrence such as, "We hold that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." App. 10 (quoting *Simmons*, 512 U.S. at 165) (Fourth Circuit emphasis omitted).

Third, the panel majority held in the alternative that relief could not be granted under AEDPA. "Even were we persuaded by Ramdass' theory that practical rather than legal parole ineligibility suffices to trigger *Simmons*, we would conclude that was not 'clearly established' as required by 28 U.S.C. § 2254(d)(1)." App. 11. After discussing the similarities between Section 2254(d)(1) and the antiretroactivity doctrine in *Teague v. Lane*, 489 U.S. 288 (1989), the majority added that Ramdass' claim would fail "either under *Teague* or under § 2254(d)(1)." App. 11-12.

Judge Murnaghan dissented on each of these points. First, he emphasized that "the scope and parameter of the *Simmons* right is a matter of federal constitutional law." App. 18. "Admittedly, the

[due process] right recognized in *Simmons* . . . only applies to those for whom state law has eliminated the possibility of parole. But, the right is a federal right." App. 18. He explained that federal due process was denied because only a hypothetical future development of the sort rejected by *Simmons* could make Ramdass eligible for release, and he berated the majority for "hid[ing] . . . behind a state law shield." App. 20.

> [A]t the time of the Kayani sentencing, only some hypothetical future development as remote as legislative reform, commutation, or clemency, could have affected entry of the Domino's Pizza robbery conviction and therefore prevented Ramdass from being parole ineligible. . . . Formal entry of the conviction at that point was merely a ministerial act. Thus, for all realistic intents and purposes, it was a guarantee that Ramdass would be parole ineligible [under state law] when the Kayani conviction was formally entered.

App. 20.[4]

Second, Judge Murnaghan declared that far from being incompatible with the logic of *Simmons*, a functional assessment of the possibility of release on parole is consistent both with "the genesis of *Simmons* [as] merely an extension of the rule in *Gardner v. Florida*, 430 U.S. 349 (1977), and *Skipper v. South Carolina*, 476 U.S. 1 (1986)," and with the specific language in the *Simmons*

---

[4] Entry of judgment was a ministerial act under state law, as applied to the circumstances of this case. At the time of the penalty phase in Ramdass' capital murder trial, the judge presiding over the Domino's Pizza matter already had denied Ramdass' motion to set aside the jury's verdict in that robbery case under Virginia Supreme Court Rule 3A:15(a), and the motion could not be renewed. *See* App. 67 (reprinting Rule 3A:15). This denial locked up the verdict and reduced the subsequent entry of judgment to a ministerial act. Although there was still a hypothetical possibility that the judge presiding over the Domino's Pizza matter could set aside the robbery verdict under Virginia Supreme Court Rule 3A:15(b) and thus eliminate the third "strike," there was an identical possibility that the judge presiding over the Pizza Hut matter could set aside *that* robbery verdict under Rule 3A:15(b) and eliminate the first "strike." In both robbery cases, the statutory 21-day window for setting aside a conviction under Rule 3A:15(b) was still open at the time of Ramdass' capital murder sentencing trial. The Virginia Supreme Court necessarily rejected any reliance on the hypothetical possibility of release under Rule 3A:15(b) when it held that the Pizza Hut conviction nonetheless counted in full as a "strike."

opinions. App. 18-19. "I do not believe that due process requires or allows [the majority's] arbitrary results." App. 20.

Third, because the clearly established rule in *Simmons* fully covers Ramdass' circumstances, Judge Murnaghan recognized that AEDPA presents no impediment to the grant of federal habeas corpus relief.[5]

The Fourth Circuit denied Ramdass' petition for rehearing en banc on September 17, 1999, with one-third of the court dissenting. App. 65-66.

II THE VIOLATION OF *AKE v. OKLAHOMA*

A. Trial and Direct Appeal

Recognizing that his cumulative offenses might make out a prima facie case for future dangerousness, Ramdass hoped to present mental health evidence that would rebut the case for future dangerousness and persuade a jury to sentence him to life imprisonment. Because the defendant was indigent, counsel moved before trial for the assistance of a mental health expert. The court granted this motion, and it *sua sponte* selected Dr. Stanton Samenow, a psychologist, to assist the defense.

Dr. Samenow's report to counsel did nothing but lambaste the client, using language one would expect to see in the report of a *prosecution* expert. According to Dr. Samenow, Ramdass is able to conform his conduct to societal norms

---

[5] Judge Murnaghan specifically distinguished Ramdass' case — in which the defendant would be absolutely ineligible for release on parole after the performance of all ministerial acts — from previous Fourth Circuit cases cited by the majority in which the court had refused to "extend" *Simmons* to defendants who "remained eligible for parole under state law even when all ministerial acts were completed." App. 19, n.5. *See, e.g., Roach v. Angelone*, 176 F.3d 210, 220 (4th Cir.) (rejecting claim that defendant was entitled to inform jury that if sentenced to life imprisonment, he would not be eligible for parole for at least 25 years), *cert. denied*, ___ S. Ct. ___, 1999 WL 688646 (Nov. 1 1999).

but has been unwilling to do so. He has lived essentially a lawless life in which he has pursued the excitement of the moment and sought to build himself up by overcoming others through deception, intimidation, and violence.

. . . .

Bobby Lee Ramdass has been intent on doing whatever he pleases with little regard to the consequences.

. . . .

The requirements of specific individuals or of society are irrelevant in Bobby's view. . . . [D]oing something just because it was forbidden or just on a dare was commonplace. Then, if held accountable, Mr. Ramdass would try to deflect the blame.

Samenow Report at 2-5.[6] Dr. Samenow's report spent three and a half pages detailing Ramdass' upbringing "in an atmosphere in which violence was a way of life." Samenow Report at 6-9. His mother was "a person who was dishonest, working only sporadically, unable to cope as a mother, of limited intelligence, promiscuous and violent." She taught Ramdass how to shoplift and he "joined with his mother in attacking and robbing others." Samenow Report at 7. Dr. Samenow quoted a 1986 psychiatric evaluation of Ramdass in which another expert had concluded:

> He is from an unbelievably dysfunctional family which has presented the worst possible role models to him. He has himself been violently abused by others . . . those who have interviewed him have uniformly been impressed with his amoral, immoral and delinquent attitudes. When one reads the social service description of his mother's personality, *one sees that he is the expectable product of his environment*.

Samenow Report at 8 (emphasis added). Nonetheless, Dr. Samenow's report dismissed the potentially mitigating conclusion of the 1986 evaluator:

> During the current evaluation, a picture emerged that somewhat *takes exception* to a view that sees Mr. Ramdass simply as an "expectable product of his environment."

Samenow Report at 8 (emphasis added). According to Dr. Samenow, Ramdass "chose" his criminal path in life, has only "the most primitive concept of injury to others," and "believes that the worst

[6] A copy of Dr. Stanton Samenow's report to defense counsel has been lodged with the Court.

thing he has ever done is to hurt his girlfriend 'by getting locked up.'" Samenow Report at 11-12.

After receiving this report, counsel concluded that there was no usable mental health evidence because Dr. Samenow "was unwilling and unable to assist the defense and would not be able to testify on behalf of Mr. Ramdass." (JA 445-46). As a result, counsel simply presented no mental health evidence, either to rebut the state's case for future dangerousness or to show why the jury should be moved to impose a sentence less than death.

Trial counsel did not challenge Dr. Samenow's competence in the direct appeal.

B. State Collateral Proceedings

In his state habeas petition, Ramdass alleged under the Fifth, Sixth, Eighth, and Fourteenth Amendments that he "was denied the reasonable assistance of a mental health expert." (JA 229). Citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), Ramdass contended that Dr. Samenow is not the "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense" that *Ake* promises. (JA 229). Rather, "Dr. Samenow is notoriously pro-prosecution and did not assist the Petitioner's defense." (JA 229). Because Dr. Samenow was incapable of assisting the defense, appointing Dr. Samenow essentially was equivalent to not appointing any expert at all.

Ramdass moved the state habeas court for the appointment of "a competent, independent mental health expert . . . to perform a competent psychological evaluation . . . [and] to advise [state habeas] counsel on . . . the significance of his findings for showing mitigating circumstances or for rebutting the Commonwealth's case on future dangerousness." (JA 268). The Virginia Supreme Court summarily denied this request. (JA 279).

Shortly thereafter, the Virginia Supreme Court issued another summary order denying habeas

corpus relief. After it dismissed enumerated claims on procedural grounds, the state habeas court addressed the merits of all remaining claims in the following two sentences: "and finding no merit in petitioner's remaining allegations, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. On further consideration whereof, the Court denies petitioner's motion to remand for evidentiary hearing." (JA 283). Ramdass' allegation that he was denied the reasonable assistance of a mental health expert was included in this group of claims for which the state court found "no merit."

C. Federal Collateral Proceedings

Ramdass alleged again in his federal petition that he was denied the assistance of a mental health expert under *Ake* in violation of rights protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments. (JA 345-56). The district court, like the state court, refused to authorize funds for a mental health expert. (JA 682-89, 696). Because new federal habeas counsel were willing to reach into their own pocket,[7] they were able to obtain a preliminary affidavit from Dr. Reuben Koller, a competent psychologist. Dr. Koller detailed the inadequacies in Dr. Samenow's evaluation of Ramdass that made the pretrial evaluation "incomplete, deficient and inadequate according to conventional psychological standards," (JA 474). Dr. Koller recommended additional testing to

[7] This is a common phenomenon in Virginia capital cases on habeas corpus. Without exception, the Virginia Supreme Court has denied every indigent petitioner's motion for expert or investigative assistance. Appointed state habeas counsel — often a solo practitioner — has been unable or unwilling to underwrite the cost of experts or investigators. Federal habeas courts have appointed new counsel in nearly every case, often from a much larger firm, and the new lawyers sometimes have been willing and able to finance privately the cost of the experts and/or investigators. *See, e.g.*, Petition for Writ of Certiorari in *Williams (Michael) v. Taylor*, No. 99-6615, at 31 n.15 (explaining that state habeas court refused to fund investigator, and that new federal habeas counsel discovered claims relating to partiality of juror only after they privately funded and retained an investigator), *cert. granted*, ___ S. Ct. ___, 1999 WL 980144 (Oct. 28, 1999).

determine if Ramdass suffers from a discrete mental illness.[8] (JA 474-77).

More importantly, Dr. Koller revealed in his affidavit that Dr. Samenow harbors well-known, preconceived, and radical notions about mental health issues that render him *incapable* of doing what *Ake* requires — incapable of rebutting future dangerousness or identifying reasons for a sentence less than death. Dr. Samenow's professional views are far outside the mainstream of psychiatric thought. (JA 474). Dr. Samenow rejects the concept of mental illness, and he also rejects the basic psychiatric principle that an individual's personality is affected by environmental factors. (JA 473-74). Dr. Samenow's viewpoint is considered to be so radical that it has not been adopted by any recognized authorities. (JA 473-74).

Dr. Koller's affidavit is corroborated by Dr. Samenow's own publications and interviews. In his 1977 treatise, *The Criminal Personality*, Dr. Samenow refers to criminals as a "different breed of person" who "knows circumstances have nothing to do with his violations, but [who] uses that rhetoric if he thinks it will lead others to view him more sympathetically." (JA 347). "The application of a mental illness diagnosis to this [criminal] population [i]s a consequence of the tortuous extension of psychologic concepts by mental health professionals. Most diagnoses of mental illness result[] from the criminal's fabrications. By his accountability statements, he mis[leads] many examiners into believing that he [i]s mentally ill." (JA 348).

In his 1984 book, *Inside the Criminal Mind*, Dr. Samenow continued this theme and rejected "the widely-held beliefs that broken homes, alcoholism, violence on TV, unemployment, drug-addiction, or passionate impulses are the causes of crime." (JA 346). The criminal "chooses crime . . . his associates, his way of life, the kind of crime he commits." (JA 346). "He rejects society

[8] The district court denied funding for the recommended testing.

long before society rejects him; he is victimizer, not victim." (JA 346).

In a feature interview for the CBS News program *60 Minutes* on February 20, 1977, Dr. Samenow elaborated on his belief that psychiatry is a tool for "excuses for crime." (Counter Number 102).[9] He proclaimed that "criminals" who murder are "programmed" for killing and are not influenced by external forces. (Counter Number 325-32). Criminals "who have been found to be mentally ill" are not really mentally ill; they merely have been "coached by others" so they can "convince a doctor that [they're] mentally ill." (Counter Number 344-58). According to the *60 Minutes* commentator, Dr. Samenow's controversial views created a "tempest in the normally quiet world of criminal psychology" and made conventional psychiatrists "hopping mad." (Counter Number 039-42).

Because of his inherent bias, Dr. Samenow undoubtedly is *incapable* of "conduct[ing] an appropriate examination and assist[ing] in evaluation, preparation and presentation of the defense" for any defendant who has a criminal history. *Ake*, 470 U.S. at 83. Dr. Samenow is *incapable* of rebutting future dangerousness by showing, for example, that the defendant would respond positively and nonviolently in a structured environment, because this expert believes that environment is irrelevant. Dr. Samenow is *incapable* of rebutting future dangerousness by showing that the defendant's violent criminal behavior was the product of a mental disease or defect that might be amenable to treatment, because this expert does not believe in mental illness. And Dr. Samenow is *incapable* of presenting reasons why the jury should impose a sentence less than death because this expert believes that criminals are a "different breed of person" who have simply chosen to be

[9] A videotape of the *60 Minutes* interview was part of the record below, and Ramdass has lodged a copy of the videotape with the Court. Quotations from the interview are identified by Time-Code Counter Number.

criminals. In short, having the assistance of Dr. Samenow is constructively the same as having no mental health assistance whatsoever. *Cf. United States v. Cronic*, 466 U.S. 648, 659 (1984) (defendant's Sixth Amendment rights are violated when he is constructively, rather than actually, deprived of effective assistance of counsel). The district court ruled that this claim was defaulted, and it did not reach the merits of Ramdass' claim.

After close review of the record, the Fourth Circuit determined that Ramdass' claim was not defaulted. The panel majority held, however, that when the Virginia Supreme Court summarily denied Ramdass' *Ake* claim as having "no merit," it "did not unreasonably apply clearly established federal law. *See* 28 U.S.C. § 2254(d)." App 14. The court of appeals' basis for this conclusion, in full relevant part, was as follows:

> *Ake* provides a right to assistance of a mental health expert only if a defendant made a showing to the trial court that his mental state was at issue in his defense of the charges or if, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony. *See Ake*, 470 U.S. at 82-83 (noting that the need for the assistance of a psychiatrist is "readily apparent" either when "the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense" or "when *the State presents psychiatric evidence* of the [capital] defendant's future dangerousness" during the penalty phase (emphasis added)). Neither condition was met here.

App. 14. In other words, because the state chose to present only *nonpsychiatric* evidence of future dangerousness, Ramdass did not have a clearly established right to a competent mental health expert to rebut the state's case for future dangerousness or to present psychiatric reasons why the jury should impose a sentence other than death.[10]

[10] The panel majority did not address Ramdass' contention that the state court's decision was "contrary to" clearly established federal law as determined by the Supreme Court. In concluding that the state court's decision did not involve an "unreasonable application" of clearly established federal law, the panel majority apparently followed binding circuit precedent holding that "habeas relief is authorized only when the state courts have decided the question by interpreting or applying the

Judge Murnaghan concurred only in the judgment. App. 15, n.1. He agreed with Ramdass that "Dr. Samenow's professed and public views make him incompetent to aid a defendant in finding and presenting mitigating factors at a defendant's sentencing phase, and that Dr. Samenow did not conduct an appropriate examination." App. 15, n.1. Although Dr. Samenow is still a licensed psychologist, "[h]e has abandoned sociologic, psychologic, and mental illness explanations for criminal behavior." App. 15-16, n.1.

Judge Murnaghan cited with approval several Tenth Circuit cases holding that *Ake* applies when the state presents *any* evidence of future dangerousness — psychiatric or nonpsychiatric — and the indigent defendant establishes a likelihood that his mental condition is a significant mitigating factor. *See, e.g., Liles v. Saffle*, 945 F.2d 333, 340-41 (10th Cir. 1991) (applying *Ake* in habeas corpus where prosecution presented only nonpsychiatric evidence of future dangerousness), *cert. denied*, 502 U.S. 1066 (1992). Constrained by AEDPA, however, Judge Murnaghan felt obliged to say that "*Ake*'s application when the prosecution has not presented its own *psychiatric* evidence on future dangerousness is not clearly established by the Supreme Court." App. 16, n.1 (emphasis added).

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relevant precedent in a manner that reasonable jurists would *all* agree is unreasonable." *Williams (Terry) v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998) (emphasis added), *cert. granted*, 119 S. Ct. 1355 (1999) (argued Oct. 4, 1999).

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT EMPLOYED STANDARDS FOR ANALYSIS THAT CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS, AND IT RENDERED A DECISION THAT CONFLICTS WITH *SIMMONS v. SOUTH CAROLINA*

A. Questions Concerning the Nature or Duration of Restraints on Liberty Require a Functional, Rather Than a Technical, Mode of Analysis

There has never been disagreement as to the practical reality of Ramdass' situation: If he was sentenced to life imprisonment, he was never going to have the opportunity to be considered for release on parole. No state or federal court judge has questioned that immutable fact. Nonetheless, because a ministerial requirement of state law had not yet been satisfied, the Virginia Supreme Court employed, and the Fourth Circuit majority ratified, a reading of *Simmons* that gave effect to technical parole eligibility and disregarded the functional reality of parole ineligibility. The Court should grant certiorari to decide whether such questions of restraints on liberty should be analyzed using a technical or a functional mode of analysis.

Whether application of *Simmons* turns on a "technical" or a "functional" analysis of eligibility for release from prison is a subspecies of a commonplace problem that has drawn this Court's repeated attention. That problem is the need to define category boundaries when a rule of federal constitutional or statutory law refers to a condition or status that is both a practical fact and a legal term of art. In closely analogous areas of the law that involve constitutional questions concerning the nature or duration of restraints on individual liberty, this Court has resolved the problem by rejecting solutions that "place[] form over substance, and labels over reality." *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987).

In applying the requirement under *Miranda v. Arizona*, 384 U.S. 436 (1966), that warnings

must precede police interrogation when a person is "in custody," for example, this Court has asked whether the determination of "custody" turns on a purely *technical* analysis of the legal rules governing police powers of arrest and detention, or if it turns on a *functional* analysis of whether the circumstances reasonably would lead the person being interrogated to believe that he or she is not free to leave the stationhouse at will. The answer is that it turns on a functional analysis. *See, e.g., Stansbury v. California*, 511 U.S. 318, 322 (1994) ("In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation"); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (officer's obligation to administer *Miranda* warnings attaches "only where there has been such a restriction on a person's freedom as to render him 'in custody'").

In determining whether an individual is "in custody" for purposes of federal habeas corpus jurisdiction, the Court similarly has applied a functional rather than technical test. In *Jones v. Cunningham*, 371 U.S. 236 (1963), for example, the Court held that a state prisoner who has been released on parole is nonetheless *functionally* "in custody" because he or she is still subject to various conditions and restrictions.

> [The Great Writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which confine and restrain his freedom; this is enough to keep him in the "custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute.

Id. at 243. In *Carafas v. LaVallee*, 391 U.S. 234 (1968), the Court held that a state prisoner's pending habeas petition was not *functionally* moot for want of custody, even though his sentence had since expired and he had been discharged from parole:

> The substantial issue, however . . . , is not mootness in the technical or constitutional sense, but whether the statute defining the habeas corpus jurisdiction of the federal judiciary in respect of persons in state custody is available here. . . . [W]e conclude that . . . once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application.

Id. at 238.

In applying the rule in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that the Sixth Amendment entitles an indigent defendant to the assistance of counsel "in all criminal prosecutions," the Court held in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), that the Sixth Amendment right to counsel turns on a *functional* determination of whether the conviction results in "imprisonment" — not on the state's *technical* classification of the offense as a felony or misdemeanor or petty offense. In determining the meaning of "imprisonment" for purposes of the *Gideon/Argersinger* rule, the Court held in *Baldasar v. Illinois*, 446 U.S. 222 (1980), that even if a state misdemeanor conviction does not *technically* result in the deprivation of liberty, that uncounseled misdemeanor conviction will *functionally* result in "imprisonment" if it transmutes a second misdemeanor conviction into a felony and thereby lead to a loss of liberty. And although the Court overruled *Baldasar* in *Nichols v. United States*, 511 U.S. 738 (1994), it did so by returning to the *functional* test it had articulated in *Scott v. Illinois*, 440 U.S. 367 (1979), that "the line should be drawn between criminal proceedings which themselves resulted in imprisonment, and those which did not." *Nichols*, 511 U.S. at 746.[11]

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[11] The same tension between technical and functional analyses can be found in cases addressing the sequence of events that relate to restraints on liberty. The Fourth Circuit majority characterized Ramdass' *Simmons* claims as merely a technical complaint about "the effect of the random timing of his trials." App. 12. But in *Escobedo v. Illinois*, 378 U.S. 478, 486 (1964), the Court demanded a functional, pragmatic analysis of the effect of sequencing. Where the defendant has been taken into custody, "[i]t would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." *See*

Under *Simmons*, the choice between a "technical" and a "functional" mode of analysis will affect a range of situations in addition to those which involve convictions that are not yet reduced to judgment, or which are subject to other procedural but pragmatically insignificant requirements. In South Carolina, for example, a post-*Simmons* statute requires the jury to engage in a two-step sentencing inquiry in a capital case.[12] The jury first decides whether there is an aggravating factor. If it does not find an aggravating factor, the jury's work is done, and the defendant is sentenced by the trial judge to life imprisonment or to a mandatory minimum term of thirty years. If, and only if, the jury finds an aggravating factor, they then decide whether to recommend a sentence of life

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generally Chatman-Bey v. Meese, 797 F.2d 987, 992-93 (D.C. Cir. 1986) (holding that government may not use method of determining date of parole eligibility for aggregated offenses if method produces different results depending on sequence in which crimes occurred) (holding approved *en banc*, *id.* at 994 n.10); *Thomas v. Brennan*, 961 F.2d 612 (7th Cir. 1992) (same).

[12] South Carolina Code § 16-3-20 is reprinted in full at App.71-75. The statute provides, in relevant part, as follows:

> (A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. . . . For purposes of this section, "life imprisonment" means until death of the offender. . . .
>
> (B) [I]f a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. . . .
>
> (C) Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. . . . Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). . . . If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years.

imprisonment or death. By operation of law, a sentence of life imprisonment in a capital case means life without parole.

This apparently straightforward South Carolina statute actually ensures that no capital defendant in South Carolina can "technically" qualify for application of the rule in *Simmons*, and therefore cannot inform the jurors that a sentence of life imprisonment means life without parole. That is because, at the moment the jury is instructed, the alternative to a death sentence might well be something less than life without parole (i.e., the jury might not find an aggravating factor and the defendant might be sentenced by the judge to a term of years). The defendant does not "technically" become ineligible for a sentence less of than life without parole until the middle of the sentencing deliberations, at the exact point when the jury finds an aggravating factor. Under a technical interpretation of *Simmons*, this South Carolina statute ensures that every juror who ultimately votes to recommend death will do so without knowing, at the moment of decision, that the only alternative to death is a sentence of life imprisonment without the possibility of parole.[13]

More hypothetically, circumstances could exist where the alternative to death is a term of years so long that, as a certainty, the defendant will not survive to come up for parole consideration even though he or she is technically eligible for parole. For example, state law might provide that if a capital defendant is not sentenced to death, he or she must be sentenced to a term of 500 years. *See, e.g., Ake*, 470 U.S. at 73 (noting that Ake was sentenced to "500 years' imprisonment on each of the two counts of shooting with intent to kill"). Even if state law allows prisoners to be considered for parole after they have served one-half of their sentence, a defendant sentenced to this term of

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[13] At least one South Carolina prosecutor already has blocked application of the rule in *Simmons* by making this precise "technical" argument. *See State v. Starnes* (Lexington County, S.C., sentenced Apr. 25, 1997) (appeal argued Sept. 21, 1999).

years functionally will never have the opportunity to come up for parole consideration, even though he or she is not "technically" ineligible for parole.[14]

The Fourth Circuit's restrictive view of *Simmons* leaves an important federal due process right subject to the vagaries of highly technical, sometimes arcane, and certainly manipulable state laws, even when functionally there is no possibility of parole. The lower court's ruling, which is at odds with this Court's disposition of similar constitutional questions, and which may have effects well beyond this case, is a matter of special and national importance that merits review by this Court.

B. Federal Questions Require a Mode of Analysis That Looks to the Operating Consequences of Relevant State Law, Rather Than a Mode That Automatically Accepts the State's Characterization of That Law

Whether application of *Simmons* is governed by state law "characterizations" or by a federal court's assessment of state law "consequences" also is a subspecies of a commonplace problem in federal constitutional law that has drawn this Court's repeated attention. Federal constitutional rules frequently turn upon states of affairs that are dependent to some extent on the operation of state law. This Court generally has resolved the problem by looking to the "consequences" of state law rather than the state's own "characterization" of that law.

This has been particularly evident in the area of taxation. In *Stone v. Memphis Steam Laundry Cleaner, Inc.*, 53 So.2d 89, 90 (Miss. 1951), for example, Mississippi's highest court characterized

[14] The Fourth Circuit majority surmised that such a functional analysis of parole eligibility would require courts to apply the rule in *Simmons* whenever a defendant is "unlikely to be paroled." App. 11. This statement confuses a defendant's *eligibility* for parole with speculation about whether the defendant would be found *suitable* for release once he or she came up for consideration. "Parole eligibility . . . simply means consideration for release. Such eligibility does not 'entitle' the prisoner to release even one day earlier than his full term or aggregate consecutive terms." *Chatman-Bey*, 797 F.2d at 991. In Ramdass' view, the basic holding in *Simmons* applies only to defendants who will not have the opportunity to be considered for release during their lifetime — not to defendants who will come up for consideration.

the state's "privilege tax" as "a tax on a person soliciting business for a laundry not licensed in this state, a local activity which applies to residents and nonresidents alike." This Court, however, looked to the consequences of the tax, not the state's characterization. "The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not "a tax on interstate commerce." *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, 392 (1952). Concluding that the effect of the levy was to tax the privilege of doing interstate business, the Court held that it violated the Commerce Clause. *See also Colonial Pipeline Co. Traigle*, 421 U.S. 100, 107-08 (1975) (citing *Memphis Steam Laundry* for proposition that "[t]his Court is, of course, not bound by the state court's determination that the challenged tax is not a tax on interstate commerce.") By the same reasoning, Virginia may define the scope of technical eligibility for parole under state law, but it is the independent obligation of the Article III court to determine whether the consequence of that definition is to deny Ramdass due process of law under the United States Constitution.

The Court similarly emphasized the need to consider state law consequences, rather than merely a state's characterization of its law, in *Bailey v. Alabama*, 219 U.S. 219 (1911). *Bailey* involved a state statute that (i) made it a criminal offense for a laborer to enter into an employment contract with intent to injure or defraud and then, after obtaining a salary advance from the employer, refusing to perform the promised service or return the advance; and (ii) made refusal or failure to perform the service or refund the money prima facie evidence of the requisite intent to injure or defraud. *Id.* at 227-28. Although the state characterized the statute as one that merely punished fraud, this Court concluded that the consequence of the statute was to employ the threat of criminal prosecution as a means of compelling involuntary servitude for mere breach of contract.

> We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured.

Id. at 238. Because of this consequence, the Court held that the statute violated the Thirteenth Amendment. *Id.* at 240-45.

In holding that "parole eligibility is a question of state law and therefore is not cognizable on federal habeas review," App. 12, the Fourth Circuit majority did not simply condone an unreasonable state-court interpretation of *Simmons*. It also misinterpreted *Simmons* itself as involving an exception to the ordinary, well-established principle that federal courts must look behind state-law characterizations to examine the *consequences* of the operation of state legal rules for federal constitutional purposes.

C. Neither 28 U.S.C. § 2254(d)(1), as Amended by AEDPA, Nor the New Rule Doctrine, Precludes the Grant of Federal Habeas Corpus Relief

The Fourth Circuit majority held, in the alternative, that even if it was "persuaded by Ramdass' theory that practical rather than legal parole ineligibility suffices to trigger *Simmons*, we would conclude that it was not "clearly established" as required by 28 U.S.C. § 2254(d)(1)." App. 11. After stating its view that Section 2254(d)(1) is more stringent than the antiretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), the court of appeals concluded that "either under *Teague* or under § 2254(d)(1), Ramdass' argument for an extension of *Simmons* would fail." App. 11-12.

Ramdass does not seek an "extension of *Simmons*." His claim is based squarely on the core rule that this Court expressed in *Simmons*. Both the legal standard in *Simmons* and the application of that standard are "clearly established" under this Court's precedents. Specifically, it is clearly

established that a capital defendant is entitled to inform the jury whenever the state seeks death based on future dangerousness and "the only available alternative sentence to death is life without the possibility of parole." *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring). Due process prohibits the state from "securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment mean[s] life without parole." *Simmons*, 512 U.S. at 161 (plurality opinion).

Relief is not precluded under 28 U.S.C. § 2254(d)(1) because the state court's decision was contrary to, or involved an unreasonable application of, this clearly established law. To the extent the Fourth Circuit majority concluded otherwise, its determination was infected by the same misinterpretation of Section 2254(d)(1) that was manifest in *Williams (Terry) v. Taylor*, *supra* n.10 In *Williams*, the Fourth Circuit held that under Section 2254(d)(1), a state court's decision to deny federal constitutional claim cannot be "contrary to" clearly established federal law unless it is in square conflict with a decision of this Court that is controlling as to law and fact, and the state court's decision cannot involve "an unreasonable application of" clearly established federal law unless it is predicated on an interpretation or application of relevant precedent that reasonable jurists would *all* agree is unreasonable.

For parallel reasons, Ramdass' claim also is not barred by the new rule doctrine. *Simmons* is not a new rule for Ramdass; it was decided before his conviction became final. Nor has Ramdass asked the Court to extend the *Simmons* rule by applying it in a novel setting. As shown in the following section, the relevant facts in Ramdass' case are nearly identical to those in *Simmons*. Ramdass seeks a straightforward application of the rule that *Simmons* applies when "the only

available alternative sentence to death is life without the possibility of parole." *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring). In Ramdass' case, as even the Fourth Circuit acknowledged, everyone except the jury knew that the only alternative sentence to death was life without the possibility of parole.

D. The *Simmons* Court Itself Used a Functional Analysis, and the Facts Demonstrating This Also Show That Ramdass' Case Is Indistinguishable from Simmons' Case on Both the Facts and the Law

Both the plurality and concurring opinions in *Simmons* are based on a functional, practical analysis that eschews state-law technicalities in favor of a realistic view of the probability of future release. Confronted with an argument from South Carolina that Simmons was not technically eligible for parole and that he could, in any event, be released by means other than parole, the plurality dismissed the state's argument as having "little force." *Simmons*, 512 U.S. at 166.

The Virginia Supreme Court and the Fourth Circuit appear to have presumed that Jonathan Simmons was technically ineligible for parole, and that this factual distinction disentitled Ramdass to benefit from the rule in *Simmons*. In truth, however, Simmons had never been declared eligible for parole, and he was only *functionally* ineligible for parole at the time of his trial. Thus, the facts which demonstrate the Court's use of a functional analysis also demonstrate that Ramdass' case is indistinguishable from Simmons' case on the facts and the law.

At the time of Simmons' trial, firmly established South Carolina law vested parole eligibility decisions solely in the Probation, Parole and Pardon Board. *State v. McKay*, 386 S.E.2d 623 (S.C. 1989). Based on this authority, South Carolina represented to this Court that:

> at the time of the trial, no state agency had ever determined that Simmons was going to be serving a sentence of life without the possibility of parole, despite the fact that he had earlier pled guilty and been sentenced to a violent crime prior to this trial. The importance of that distinction is that the power to make that determination did not rest with the judiciary, but was solely vested in an executive branch agency, the South Carolina Board of Probation, Parole and Pardon Services. *State v. McKay*, 300 S.C. 113, 386 S.E.2d 623 (1991) (proper for the trial court to refuse to determine whether earlier violent offense conviction was part of one continuous course of conduct). *Accord Williams v. Commonwealth*, *supra*; [*State v.*] *Torrence*, [406 S.E.2d 315], 323 [(1991)] ("there is no way [for the court] to be assured that the Parole Board would reach the same conclusion as the court [on questions of parole ineligibility]").

Respondent's Brief in *Simmons v. South Carolina*, No. 92-9059, at 95-96; 1993 WL 669003 at *95-96 (brackets in original). In other words, Simmons was not technically ineligible for parole under state law *until the parole board said so*, and at the time of his trial there was a possibility that the board would reach a different conclusion than the court on the question of parole eligibility.[15] Although the General Counsel to the Department Corrections testified at Simmons' trial that Simmons would serve a sentence of life without parole, he qualified this testimony, indicating that Simmons would be ineligible for parole only "*assuming* that was the second conviction not related to the first violent offense. . . ." Joint Appendix in *Simmons v. South Carolina*, No. 92-9059, at 13; 1993 WL 669003 at *13a (emphasis added).

In his reply brief, Simmons acknowledged that Simmons had not yet been found ineligible for parole. "This assertion, though technically true, is irrelevant." Petitioner's Reply Brief in *Simmons v. South Carolina*, No. 92-9059, at 1; 1993 WL 625970 at *1. Simmons called it irrelevant because he believed that he met the statutory criteria for parole ineligibility under S.C. Code § 24-21-640, and that a future declaration to this effect by the parole board would be a mere formality.

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[15] At first blush, it appeared that the murder conviction counted as Simmons' second "strike" — a fact that would have rendered him ineligible for parole under South Carolina law. The parole board might have made a factual finding, however, that the murder was related to the violent crime that constituted Simmons' first "strike." The result of such a finding would be that Simmons was still eligible for parole because offenses that were part of a "continuous course of conduct" could not count as separate "strikes." *See* S.C. Code Ann. § 24-21-640 (1993 Supp.).

At oral argument, counsel for South Carolina did not retreat from the position, expressed in his brief, that Simmons was not technically ineligible for parole until the parole board made the required finding. Transcript of Oral Argument in *Simmons v. South Carolina*, No. 92-9059, at 23-50; 1994 WL 663636 at *23-50 (Jan. 18, 1994).

Discounting South Carolina's make-weight argument that Simmons was not *technically* eligible for parole, this Court considered Simmons' ineligibility for parole to have been conceded. "Respondent admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate." *Simmons*, 512 U.S. 166 (plurality opinion). The Court obviously could not have characterized any of South Carolina's statements as an admission of parole ineligibility unless the Court was using a functional, rather than a technical, definition of that term. The Court then quickly disposed of the remainder of South Carolina's equally technical "possibility of release" arguments, e.g., pardon, change of law, or escape: "To the extent that the state opposes even a simple parole-ineligibility instruction because of hypothetical future developments, the argument has little force." *Id.*, 512 U.S. at 166 (plurality opinion).

For purposes of applying the rule in *Simmons* to Ramdass' case, the fact that a Virginia court had not yet performed the ministerial act of entering judgment on Ramdass' conviction for the Domino's Pizza robbery is of no more consequence than the fact that a South Carolina parole board had not yet determined whether Simmons' offenses were part of a continuous course of conduct. Both acts are the kind of "hypothetical future developments" that the Court dismissed out of hand.

The outcome of these future developments was at least as much a foregone conclusion in Ramdass' case as it was in Simmons' case: everyone except the jury knew that the trial judge presiding over the Domino's Pizza matter was going to make Ramdass ineligible for parole by

performing the ministerial act of entering judgment, *see supra*, n.4; and everyone believed that the South Carolina parole board was going to make Simmons ineligible for parole by finding that the murder and his prior offenses were not part of a continuous course of conduct and that they counted as separate "strikes." No court throughout the present proceedings has quarreled with this conclusion: Ramdass, like Simmons, was not functionally eligible for parole at the time of his trial.

The fact that Simmons was technically eligible for parole, but functionally ineligible for parole, underscores the pragmatic nature of this Court's analysis. It is consistent with the fact that the Court repeatedly and reasonably spoke not just about ineligibility for parole under the strict letter of state law, but also about imprisonment without "the possibility of parole." *See Simmons*, 512 U.S. at 177 (O'Connor, J., concurring) ("I agree that due process requires that the defendant be allowed to [inform the jury] in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future"); *see also id.* at 162, 165 (plurality opinion). If Jonathan Simmons had a due process right to inform the jury that he was ineligible for parole, even though he was technically still eligible under state law on the date of his sentencing trial, then Bobby Ramdass had the same due process right, even though he was technically still eligible for parole until the Domino's Pizza judge performed the ministerial act of entering judgment.

A functional, realistic assessment of eligibility for constitutional protections is consistent with this Court's analysis of the identical issue in *Simmons*, and with its analysis of closely analogous issues in other cases. To the extent that the Fourth Circuit approved a rigid technical analysis and failed to assess the constitutional consequences of the state's procedural laws, the Fourth Circuit's error is of special and recurring importance. This Court's review is, thus well warranted.

II WHETHER THERE IS A DUE PROCESS RIGHT TO THE ASSISTANCE OF A PSYCHIATRIST IN THE SENTENCING PHASE OF A CAPITAL CASE FOR PURPOSES OTHER THAN REBUTTING PSYCHIATRIC EVIDENCE OF FUTURE DANGEROUSNESS IS A QUESTION OF NATIONAL IMPORTANCE ON WHICH THE COURTS OF APPEALS ARE SPLIT

This Court has repeatedly held that the Fourteenth Amendment requires states to provide indigent criminal defendants with the "basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). *See, e.g., Griffin v. Illinois*, 351 U.S. 12 (1956) (right to trial transcript for appeal); *Burns v. Ohio*, 360 U.S. 252 (1959) (right to appeal without paying filing fee); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to assistance of counsel at trial); *Douglas v. California*, 372 U.S. 353 (1963) (right to assistance of counsel on first appeal as of right); *see also Little v. Streater*, 452 U.S. 1 (1981) (right in quasi-criminal proceeding to blood grouping tests).

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Court affirmed that a psychiatrist can be a "basic tool" within the meaning of the Fourteenth Amendment. It held that the state must assure access to a competent psychiatrist when an indigent defendant "demonstrates that his sanity at the time of the offense is to be a significant factor at trial, . . . [or] when the State presents psychiatric evidence of the defendant's future dangerousness" at a capital sentencing proceeding. *Id.* at 83. Although this holding nominally reflects the particular facts and circumstances presented in *Ake*, the Court also made quite clear the breadth of its ruling by setting out a three-part balancing test for determining whether any "tool" is "important enough to preparation of a defense to require the State to provide" that assistance: "The first [inquiry] is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought,

and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake*, 470 U.S. at 77.

As shown below, most federal habeas courts to address the issue have concluded that *Ake* is not limited to its facts. The Fourth Circuit, however, as it did in *Williams* (*Terry*) v. *Taylor*, held here that 28 U.S.C. § 2254(d)(1) permits the grant of habeas corpus relief for a claim based on *Ake* only where the petition presents the identical facts and circumstances that were present in *Ake*. In the penalty phase, according to the Fourth Circuit, that means that there is a constitutional right to a mental health expert under *Ake* only when the prosecution has introduced *psychiatric* evidence of future dangerousness. App.14. In that court's view, there is no "clearly established Federal law, as determined by the Supreme Court of the United States," which recognizes an indigent's right to the assistance of a psychiatrist in anything other this precise factual setting. Section 2254(d)(1). The Court should grant certiorari to clarify the well-grounded rule in *Ake* and to address the special and important question of the degree of factual identity required by Section 2254(d)(1).[16]

A. The Fourth Circuit's Reading of *Ake* Conflicts with the Decisions of Most Courts of Appeals That Have Addressed the Issue

In habeas corpus cases similar to Ramdass' case, the courts of appeals have characterized the

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[16] Although great caution must be exercised in drawing inferences from a GVR, the remand of *Bowden v. Francis*, 470 U.S. 1079 (1985), supports the proposition that this Court did not intend to limit *Ake* to its facts. The penalty phase claim in Bowden's habeas petition alleged only "that petitioner was entitled to the assistance of a psychiatrist to present *mitigating evidence*." *Id.* at 1080 (statement of O'Connor, J., dissenting) (emphasis added). Further, the state had not "attempt[ed] to utilize the aggravating circumstance of 'future violence', so therefore, Petitioner was not denied the right to rebut such evidence." Respondent's Brief in Opposition to Certiorari, *Bowden v. Francis*, No. 83-7032, at 10. On remand, Bowden was denied collateral relief because of these factual differences. *See Bowden v. Kemp*, 767 F.2d 761, 764 n.5 (11th Cir. 1985) ("Unlike the sentencing situation in *Ake*, Bowden's prosecutor had no need to present psychiatric evidence to show an aggravating factor, and he presented none). Bowden did not test the scope of *Ake* by asking this Court to review the court of appeals' decision following remand.

core rule in *Ake* in different ways. With one exception, they all read *Ake* as establishing a broader rule than does the Fourth Circuit. The Fourth Circuit is one of only two courts of appeals that employ a narrow, literal reading of *Ake*: in that court's view, an indigent defendant is constitutionally entitled to the assistance of a psychiatrist in the penalty phase of a capital case if and only "if, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony." App. 14. The Fourth Circuit rejected Ramdass' allegation regarding Dr. Samenow on the sole ground that there is no clearly established constitutional right to an expert in the penalty phase if the prosecution does not present *psychiatric* evidence of future dangerousness. *Id.*

The Fifth Circuit has read *Ake* in a similarly restrictive manner. In *Goodwin v. Johnson*, 132 F.3d 162 (5th Cir. 1998), the court said that due process entitles an indigent defendant to the appointment of a psychiatric expert "to present rebuttal evidence at sentencing 'when the State present psychiatric evidence of the defendant's future dangerousness.' . . . The state presented no such evidence in this case." *Id.* at 188.

Other circuits, presented with *Ake* claims in habeas corpus petitions, have read the basic holding in *Ake* more broadly. Notwithstanding the antiretroactivity doctrine, the Tenth Circuit repeatedly has held that *Ake* requires "the appointment of a mental health expert to assist the defendant in the penalty phase when the State presents evidence, *psychiatric or otherwise*, concerning the defendant's future dangerousness, and the defendant establishes the likelihood that his mental condition could have been a significant mitigating factor." *Moore v. Reynolds*, 153 F.3d 1086, 1108-09 (10th Cir. 1998) (emphasis added) (quoting *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir 1995), *cert. denied*, 516 U.S. 1123 (1996), in turn citing *Liles v. Saffle*, 945 F.2d 333, 341 (10th Cir. 1991)), *cert. denied*, 119 S. Ct. 1266 (1999).

The *en banc* Eleventh Circuit, in *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992), read the core rule in *Ake* even more liberally, dismissing the restrictive view that the constitutional right to a mental health expert arises only when the state argues future dangerousness. "As applied to the penalty phase of a capital case, *Ake* requires a state to provide the capital defendant with such access to a competent psychiatrist upon a preliminary showing to the trial court *that the defendant's mental status is to be a significant factor at sentencing*." *Id.* at 928-29 (emphasis added). The state urged the federal habeas court in *Clisby* to "adopt a narrow reading of *Ake* that would restrict a capital defendant's right to access to a competent psychiatrist for the evaluation, preparation, and presentation of mitigating evidence at sentencing to a case in which the state has introduced expert testimony regarding the defendant's future dangerousness." *Id.* at 929 n.7. The *en banc* Eleventh Circuit declined. "We reject such a categorical limitation of *Ake* 's scope." *Id.*

In *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994), the prosecution had "presented no evidence as to future dangerousness." *Id.* at 1293 n.11. Nonetheless, the Eighth Circuit, like the Eleventh, held in a habeas corpus case that the failure to appoint an independent mental health expert violated the defendant's right to due process. "Like Ake, Starr's mental condition was his only viable defense and his strongest argument in mitigation for sentencing purposes. Thus, Starr's situation falls well within *Ake*'s dictates that a capital defendant whose mental condition is seriously in issue be provided with expert assistance." *Id.* at 1288.

Similarly in *Smith v. McCormick*, 914 F.2d 1153,1157 (9th Cir. 1990), a case in which there was no indication that the prosecution had presented evidence of future dangerousness, the habeas court said that "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase."

Finally, in *Terry v. Rees*, 985 F.2d 283 (6th Cir. 1993), the habeas court read *Ake* as establishing a rule that is not limited to the assistance of psychiatrists in particular circumstances, but applies equally to other kinds of forensic experts in other circumstances. Relying solely on *Ake*, the Sixth Circuit concluded that the petitioner "was deprived of the opportunity to present an effective defense when he was denied an independent pathologist in order to challenge the government's position as to the victim's cause of death." *Id.* at 284.

It is worth noting that all of the cases cited above were habeas corpus cases brought under 28 U.S.C. § 2254. All were cases decided after this Court imposed the antiretroactivity doctrine in *Teague*. All were cases where the federal habeas court had to define the scope of the core rule in *Ake*. None, except the Fourth and Fifth Circuits, concluded that the core rule was limited to the unique factual circumstances present in *Ake*, where the prosecution presented psychiatric evidence of future dangerousness. The Court should grant certiorari both to resolve the conflict in the circuits and, on a national scale, to clarify its core hold in *Ake*.

B. The Fourth Circuit Failed To Consider the Substance or the Function of the Balancing Test That Is a Key Component of the Rule in *Ake*

The Fourth Circuit's limited and literal reading of *Ake* wholly ignores the portion of this Court's opinion which sets out the three-part balancing test for determining whether a particular form of assistance is a "basic tool[s] of an adequate defense." *Ake*, 470 U.S. at 77. That test is an essential part of this Court's opinion. By including this test, the Court reasonably signaled that it was announcing "a rule designed for the specific purpose of evaluating a myriad of factual contexts," *Wright v. West*, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring in the judgment). Announcing a rule for decision-making, rather than merely rendering a ruling about a defendant's access to one

specific kind of expert under very specific circumstances, is consistent with the Court's important, overarching role in the judicial system and the Court's limited resources. When a rule is designed to evaluate different factual contexts, "it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Id.*

Under the three-part balancing test, a defendant's interest in presenting psychiatric testimony to rebut future dangerousness is compelling, regardless whether the state's evidence of future dangerousness is psychiatric or nonpsychiatric. The defendant's interest in presenting the jury with truthful information which supports a sentence less than death is equally compelling. No state interest weighs against this right except perhaps its economy — an interest this Court squarely rejected in *Ake*. The probable value of the psychiatric assistance, and the risk of error if such assistance is not offered, also weigh in Ramdass' favor. Psychiatric evidence can show that the defendant is not a future danger, even when the prosecution's case for future dangerousness is not based on psychiatric testimony. It also can show dramatically why the ultimate sentence is not appropriate in a particular case. That is particularly true when half of the state's statutory mitigating factors relate to mental condition. *See* Virginia Code § 19.2-264.3:1.[17]

C. The Clarity of the Rule in *Ake* Was Not Diminished by Passage of AEDPA

Although the Fourth Circuit rejected Ramdass' claim under 28 U.S.C. § 2254(d)(1) rather

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[17] The Fourth Circuit's reading of *Ake* also would have the perverse effect of putting the prosecution in control of the defendant's access to resources. In states like Virginia, where the prosecutor has no pretrial obligation to disclose witnesses or produce expert opinions that have not been reduced to a written report, *see* Virginia Supreme Court Rule 3A:11(b), both the indigent defendant and the trial court may be left in the dark — until the middle of the sentencing trial — about whether the condition precedent exists that entitles the defendant to the assistance of a psychiatrist. Nothing in *Ake* contemplates such a disruptive result.

than under *Teague*, this is a difference without a distinction. In the pre-AEDPA cases cited above, the Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits all recognized that the clearly established rule in *Ake* is broader than what the Fourth Circuit has allowed. The clarity of the established rule in *Ake* was not diminished by passage of AEDPA.

Nor has AEDPA meaningfully changed the test for determining whether a rule is "clearly established." Ramdass agrees with the petitioner in *Williams* (*Terry*) *v. Taylor*, that Section 2254(d)(1) essentially codifies the new rule doctrine, and it does not impose a stricter standard. Under Section 2254(d)(1), just as under *Teague*, a federal habeas court's authority to grant Ramdass collateral relief depends on whether *Ake* clearly provides that an indigent defendant is entitled to the assistance of a competent psychiatrist in a capital sentencing trial when the defendant's mental condition is at issue, regardless whether or not the prosecution presents *psychiatric* evidence of future dangerousness.[18]

If, as Ramdass contends, and as the majority of circuits to address the issue have concluded, the basic rule in *Ake* is not narrowly limited to capital cases where the prosecution presents psychiatric evidence of future dangerousness, then the Virginia Supreme Court's decision in this case was contrary to or an unreasonable application of *Ake*, and the Fourth Circuit erred when it failed to grant of the writ.

D. This Case Presents a Good Vehicle for Addressing the Question Presented

This Court has previously declined to consider the scope of an indigent defendant's access to assistance of experts because the defendant failed to make a sufficient showing of need. *See, e.g.,*

[18] In *Rogers v. Gibson*, 173 F.3d 1278, 1285 n.5 (10th Cir. 1999), the court unequivocally reaffirmed its reading of *Ake*. It questioned, but did not decide, whether 28 U.S.C. § 2254(d)(1), as amended by AEDPA, might require it to defer to a state court's contrary interpretation.

Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985) (declining to consider whether defendant had constitutional right to criminal investigator, fingerprint expert, and ballistics expert because "the requests were accompanied by no showing as to their reasonableness").

Ramdass' case does not suffer from that threshold infirmity. There was no dispute below about the adequacy of Ramdass' request for the assistance of a mental health expert. The state did not oppose Ramdass' pretrial motion, and the trial court expressly granted that motion. Ramdass' case thus presents a good vehicle for review. There is a strong probability that if Ramdass' claim is considered on the merits, he will be entitled to collateral relief. The defendant's right to due process clearly is violated when the state's statutory aggravating and mitigating factors refer to depravity, mental illness, and mitigation, but the trial court appoints a mental health expert who does not believe in mental illness or mitigation. An expert like Dr. Samenow was tantamount to no expert at all.

III THE COURT'S DECISION IN *WILLIAMS v. TAYLOR* MAY BE DISPOSITIVE OF SOME OF THE ISSUES PRESENTED IN THIS PETITION

As Ramdass has discussed above in Sections I(C) and II(C), there is a close relationship between parts of both of the issues presented in this case and the questions about 28 U.S.C. § 2254(d)(1) that are pending before the Court in *Williams* (*Terry*) *v. Taylor*. Although Ramdass believes he has given the Court ample reason to grant his petition for certiorari without waiting for the decision in *Williams*, it would be equally appropriate for the Court to stay consideration of Ramdass' petition pending the decision in *Williams*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one copy of each of the following:

Motion For Leave To Proceed In Forma Pauperis
Application For A Stay Of Execution
Petition For Writ Of Certiorari
Appendix to Petition For Writ of Certiorari

was served by telecopy and/or hand delivery and First Class Mail on counsel for the Respondent, Katherine P. Baldwin, Esq., Assistant Attorney General, Criminal Litigation Section, Commonwealth of Virginia, 900 East Main Street, Richmond, VA 23219 on 11/12/99.

F. Nash Bilisoly